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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 889

SIMON JACKSON,
Petitioner,

vs.

ALLEN INDUSTRIES, INC.,
a Delaware Corporation,
Respondent.

PETITION AND APPENDIX FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Sixth Circuit affirming the order dismissing plaintiff-petitioner's cause of action entered by the United States District Court for the Eastern District of Michigan, Southern Division, for failure of proofs, and sustaining the action of the District Court in refusing to compel obedience to a subpoena duces tecum issued in Petitioner's behalf and served upon Charles W. Brown, Special Agent in Charge, Federal Bureau of Investigation, at Detroit, Michigan.

OPINION BELOW

The opinion in this case was rendered by the Court of Appeals for the Sixth Circuit on January 2, 1958, and is reported at 250 Fed. 2nd 629.

The opinion of the District Court is unreported but is included in the Appendix to Appellant's Brief in the Court of Appeals.

Both Opinions are included in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 2, 1958. The jurisdiction of the Supreme Court of the United States is invoked pursuant to the provisions of 28 *U. S. C. A.* Sec. 1254.

QUESTIONS PRESENTED

1. Does any privilege against disclosure by the government exist where both the identity of the informer and the general nature of the information given to the government are known?
2. If such privilege does exist, did the claim of privilege as presented by the Attorney-General, in response to the subpoena duces tecum served upon the Special Agent in Charge of the Federal Bureau of Investigation at Detroit, satisfy the requirements set forth by this Court in its opinion in *U. S. vs. Reynolds*, 345 U. S. 1?
3. Was Petitioner deprived of due process of law in violation of rights guaranteed to him under the Fifth Amendment to the Federal Constitution?

STATUTES INVOLVED

The Fifth Amendment to the Constitution is involved; and also the Department of Justice Executive Order No. 3229, Revised, as published in the Federal Register, Volume 18, page 1368, March 10, 1953.

STATEMENT

Petitioner brought a common law action to recover damages for wrongful interference with his employment by Respondent, and for an injunction restraining the continuance of such interference. The District Court dismissed for failure of proofs. The Court of Appeals for the Sixth Circuit granted partial leave to appeal *in forma pauperis* by permitting Petitioner to file typewritten appendix and brief. Jurisdiction rests on diversity of citizenship.

Petitioner was employed by defendant from 1947 to 1950. On August 6, 1951, he obtained an appointment to the Federal Classified Service. On the same date a "Request for Report of Loyalty Data From the Federal Bureau of Investigation" was executed by the United States Civil Service Commission. In May, 1952, charges were filed and a loyalty hearing held, with the result that Petitioner was suspended from the Service in January, 1953.

The substance of the loyalty charge was

> "the Commission has received information that (a) some time during the period 1947 to 1950, you were the medium by which the 'Daily Worker', an East Coast Communist publication, was brought into the Allen Industries Plant, Detroit, where you were employed; (b) During this same period, you were closely associated with Gerald Boyd, James Walker, Ernestine Williams (now known as Ernestine Wilson) and Marie Hilt, all of whom have been reported as members of the Communist Party; and (c) in March, 1949, you attended a meeting of the Auto Section of the Communist Party, 2419 Grand River, Detroit."

From this and for other reasons plaintiff concluded that Respondent was the source of the adverse loyalty information and commenced action. As shown by the testimony included in the appendix hereto, for some years prior to 1947, Philip Hommer who became Respondent's Labor Relations Supervisor in 1949 had been a member of the Communist Party. Both he and the personnel manager, Angelo, admit that they discussed Petitioner with the F.B.I. agents commencing in 1950 and going into 1951, but refused to admit any discussions after August of 1951. Hommer claimed he could not recall making a statement on the pre-trial deposition that he discussed Petitioner with the Civil Service detail of the F.B.I. and asserted that such testimony must have been in error. The testimony of these two men, particularly the ex-Communist, Hommer, is to the effect that he knew, by reason of his own Party membership, that the several persons named in the charge were employed at Allen Industries and were also Party members when he was. Hommer did not know if their membership continued into 1950, when Petitioner first became

active with them in connection with certain union matters, or if they had severed their connections as he claimed he had. Hommer did not know if Petitioner knew if they were or ever had been members of the Communist Party or what they talked about when together. Hommer also claimed that all information given the F.B.I. was carefully qualified to reflect the exact extent of his personal knowledge. A Subpoena Duces Tecum was served on the Special Agent in Charge of the F.B.I. at Detroit requiring him to appear and

> "testify on behalf of Simon Jackson in the above entitled action and bring with you that file or group of files containing information given you by Allen Industries, Inc., a Delaware corporation, Philip A. Hommer, its employee, or any other officer, servant, agent or employee of Allen Industries, Inc., with reference to Simon Edward Jackson, 3555 24th Street, Detroit 8, Michigan, former employee of Allen Industries, Inc., and subsequently employed at Detroit Tank Arsenal, Centerline, Michigan. It is hereby stipulated and agreed by plaintiff, Simon Jackson, that a delivery of said files or group of files in a sealed envelope to the Hon. Arthur F. Lederle, judge of said court, for determination *in camers* and *ex parte* whether said information is material to the cause and whether it is of such nature that it should not be admitted into evidence in open court, or whether there are other reasons for its suppression, will be deemed compliance with this subpoena."

The Special Agent, Brown, appeared but refused to produce the records for examination by the Court for any other reason and stated that he was to inform the Court that

(1) The Attorney General was fully advised; and

(2) In response to the Subpoena Duces Tecum the witness was instructed to invoke the privilege under Executive Order 3229.

The District Attorney appeared in behalf of the Attorney General of the United States and invoked a claim of privi-

lege as to any and all documents subpoenaed, by virtue of the Department of Justice Order No. 3229. No reason was stated for the invocation of the privilege.

During his examination the Special Agent testified that information from such a file as this would, without specific authorization, be made available to any government agency that had an interest in the matter, including the Civil Service Commission; and then took the position that the federal judiciary is not a government agency as such and therefore not entitled to the information from the file.

The Court refused the motion to quash the Subpoena Duces Tecum and also refused to compel obedience to it.

The Pleadings

The charging part of the bill of complaint, here pertinent, reads:

"COUNT III.

"16. Plaintiff is informed and believes that from and since September 12, 1950, divers persons, firms and units of government to which he has made application for employment have directed inquiries concerning his employment with, and reasons for separation from employment with, defendant, Allen Industries, Inc.

"17. Plaintiff is informed and believes that in responding to such inquiries, and wilfully and maliciously and for the purpose of injuring plaintiff in his employment and attempts to secure employment, defendant has replied in such terms as to lead the prospective employer, or employer, to believe that plaintiff is a radical in his political convictions, a Communist, subversive, an agitator and other wise disloyal to the government of the United States and undesirable as an employee.

"18. No such charges were made to plaintiff at the time of his discharge by Allen Industries, Inc., nor have they been made to him personally at any time by said defendant.

"19. That said innuendos, implications, suspicions, and suggestions on the part of defendant are wholly

false and misleading and no foundation exists therefore in fact.

"20. That by reason of defendant's conduct as aforesaid, plaintiff's contracts of employment have been interfered with, and he has lost employment and been prevented from obtaining other employment, and by reason thereof has sustained damages in the sum of approximately $4,500.00 to date.

"21. That unless defendant is enjoined and restrained from continuing said course of conduct, plaintiff will continue to be deprived of his right to work or to suffer a serious curtailment thereof, to his irreparable harm and injury."

Respondent's Answer placed all these allegations in issue and, in addition, raised the following affirmative defenses which were placed in issue by Petitioner's Reply:

"24. For separate and distinct defenses as to Count III of the complaint, defendant alleges:

"(a) *First,* that if any responses were made to any inquiries concerning plaintiff's employment with defendant, received by defendant from persons who alleged themselves to be present or prospective employers of plaintiff, such responses were privileged.

"(b) *Second,* that if any responses were made to any inquiries concerning plaintiff's employment with defendant, received by defendant from persons who alleged themselves to be present or prospective employers of plaintiff, such responses stated the truth.

"(c) *Third,* That any cause of action alleged by said Count III of the complaint is not brought within the time allowed by statutes limiting the bringing of such causes, and is therefore barred.

"(d) *Fourth,* That the facts alleged in Count III of said complaint are insufficient to state a claim upon which relief can be granted."

At the trial, the District Attorney filed a Motion to Quash the subpoena, the fourth paragraph of which reads:

> "4. As to Charles W. Brown, Special Agent in Charge, Detroit, Michigan, Federal Bureau of Investigation, claim of privilege is invoked as to any and all documents referred to in the instant subpoena. This privilege is claimed by the Attorney General of the United States by virtue of Department of Justice Order No. 3229 • • •."

The Evidence

Four witnesses testified to matters material to the questions before the Court: the Petitioner; Charles W. Brown, Special Agent in Charge of the Federal Bureau of Investigation at Detroit; and Angelo J. Palmer and Philip A. Hommer, personnel manager and labor relations supervisor, respectively, at the Respondent's plant. In addition, after identification by an employee of the United States Civil Service Commission, certain files from its office were admitted in evidence and testimony was given bearing on the question of damages. Exhibits included the charges which formed the basis of the loyalty hearing and the request of the Civil Service Commission, directed to the Federal Bureau of Investigation, for investigation of Petitioner's loyalty.

The verbatim testimony of these witnesses, as it relates to the questions before the Court, is set forth in the Appendix to this Petition. The two exhibits are also included, as well as a copy of the Executive Order 3229.

The Opinion Below

The Trial Court placed its dismissal of the cause of action squarely on Petitioner's inability to prove his case, saying (App. 5a, 6a):

> "The court here reaffirms its refusal to compel compliance with the subpoena duces tecum served on Mr. Brown. Weighty constitutional problems, such as this, should be avoided when cases may be disposed of on other grounds. In this case, the F.B.I. files demanded could have provided plaintiff only with corroborative

evidence of what the defendant's agents told the F.B.I. and evidence that the information so obtained was communicated to the Civil Service Commission. Had the plaintiff otherwise proved his case, the court might well have taken judicial notice of the fact that information received by the F.B.I. is made available to other agencies of the government, such as the Civil Service Commission and Loyalty Review Board.

"Plaintiff has, however, fallen far short of proving his case. To make out a case of intention or malicious interference with employment, plaintiff must show that the acts done by defendant, which resulted in plaintiff's discharge, were done with the intent or purpose of bringing about plaintiff's discharge. 30 Am. Jr. 67, 86 C. J. S. 959 et seq. Here it is clear that the statements made by defendant's agents to the F.B.I. could not have been intended by them to interfere with any employment of plaintiff. The first two conferences with F.B.I. agents were held while the plaintiff was still employed by the defendant and at the time of the last conference with the F.B.I. agents, it does not appear that defendant's agents knew where plaintiff was working or that he might be seeking employment from a governmental agency."

The Court of Appeals affirmed the action of the Trial Court in refusing to compel obedience to the subpoena duces tecum, saying that the case is controlled by *Boske vs. Comingore*, 177 U. S. 459; *U. S. ex rel Touhy vs. Ragen*, 340 U. S. 462; *Appeal of U. S. Securities and Exchange Commission*, 226 Fed. (2d) 501, (C.A. 6); and, further, that plaintiff had failed to prove his case.

REASONS FOR GRANTING THE WRIT

The decisions of both the Trial Court and the Court of Appeals appear to ignore the requirements for a valid claim of privilege enunciated by this Court in *U. S. vs. Reynolds*, 345 U. S. 1, by sustaining the claim of privilege without requiring any showing of actual personal consideration of the matter by the Attorney-General, or a statement of reasons for invoking the privilege. In effect, both

courts completely abdicated the judicial function. The holdings are also in conflict with the opinion of this Court that no privilege as to the contents of a disclosure exists where the identity of the informer is known. *Roviaro vs. U. S.*, 353 U. S. 53.

ARGUMENT

I.

Does any privilege against disclosure by the government exist where both the identity of the informer and the general nature of the information given to the government are known?

We only assume that the government is claiming an informer's privilege; but, in the absence of stating some other recognized ground of privilege, such as that against disclosure of military secrets, it either must be this or a claim that F.B.I. records are privileged simply because they are F.B.I. records.

As this Court stated in *Roviaro vs. U. S.*, 353 U. S. 53, the scope of privilege is limited by its underlying purpose. The pertinent question then is: What interest is to be protected by refusing to make the evidence sought available to plaintiff? Respondent is already in Court so there is no protection against being sued. If the evidence is simply — as the trial court assumes — corroborative of the evidence already given, then respondent is not liable. On the other hand, if the evidence, as petitioner believes, would show that respondent's agents were not so circumspect as they claim, then it is a question of weighing respondent's right to cover up falsification against plaintiff's right to all the evidence.

In addition there is the specific testimony of the Special Agent that this evidence is available to "interested government agencies" and there is no showing of any restrictions being placed upon its use by other agencies. Upon what basis then does the Attorney-General validly claim a privilege against producing the same material in Court?

II.

If such privilege does exist, did the claim of privilege as presented by the Attorney-General, in response to the subpoena duces tecum served upon the Special Agent in Charge of the Federal Bureau of Investigation at Detroit satisfy the requirements set forth by this Court in its opinion in *U. S. vs. Reynolds*, 345 U. S. 1?

The requirements for a claim of privilege, as stated in *U. S. vs. Reynolds*, 345 U. S. 1, 7-9 are:

(1) A formal claim of privilege

(2) Lodged by the head of the department which has control over the matter

(3) After actual personal consideration by that officer.

The Court held that Paragraph 4 of the Motion to Quash constituted a formal claim of privilege by the Attorney-General. We do not believe this satisfies the requirement in that there is no statement of reason for invoking the claim. There is no showing of personal consideration by the Attorney-General.

Presumably the consideration to be given the case will involve a weighing of the public interest against the right of any litigant to have all available evidence presented to the Court and the formulation of conclusions as to whether a claim of privilege should be made, set forth in such terms that the Court can appreciate the reasons for its assertion.

Lacking such procedure a so-called claim of privilege amounts to nothing more than an arbitrary and contumacious refusal to obey the orderly processes of the Court.

III.

Was Petitioner deprived of due process of law in violation of rights guaranteed to him under the Fifth Amendment to the Federal Constitution?

The evidence which petitioner needs, and which is contained in the files of the F.B.I., includes: the dates on which the F.B.I. talked with respondent's agents about

petitioner; the names of the persons with whom the F.B.I. talked at Allen Industries, Inc.; the precise nature of the statements made to the F.B.I. by respondent's personnel manager, labor relations supervisor, or other officers or directors; whether the F.B.I. made its investigation at the request of the Civil Service Commission and whether it so informed respondent's agents so that respondent knew petitioner's employment was involved; and whether the F.B.I. transmitted information so obtained to the Civil Service Commission or the Loyalty Review Board. To deny this evidence to petitioner is to leave him wholly at the mercy of the testimony of respondent's agents who can hardly be assumed to be impartial or objective. The suggestion by the trial court and the Court of Appeals that petitioner must prove his case without this evidence, or to be entitled to it, is to require him to make bricks without straw.

The cases of *Boske vs. Comingore,* 177 U. S. 459 and *U. S. ex rel Touhy vs. Ragen,* 340 U. S. 462, on which the Court of Appeals relies were both decided before the *U. S. vs. Reynolds, supra.* We suggest that in the *U. S. vs. Reynolds* this Court attempted to meet the problems raised by the dissenting opinion in the Touhy case and both Boske and Touhy must now be construed with Reynolds. The instant case is also to be distinguished from *Touhy vs. Ragen* in that a request was made that the Attorney-General submit the files to the Court for the purpose of enabling the Court to determine whether the contents are material and whether the public interest required that the file be suppressed.

With reference to the *Appeal of the United States Security and Exchange Commission,* 226 Fed. (2d) 501 (C. A. 6), the Commission had furnished evidence of conversations and correspondence had directly with the parties to the case; the additional material sought consisted of intra-office communications by the various members of the Commission's staff. The Commission resisted disclosure on a well-recognized ground for a claim of privilege — namely, that it was considering possible criminal action which would be hampered by such a disclosure. That, under such circumstances, the Court of Appeals should violently oppose the actual jailing of the Commission's attorney for

refusal to produce the records demanded is understandable; but this furnishes no basis for an assumption that the Attorney-General of the United States would refuse to produce material and necessary records if ordered to do so after being overruled in his claim of privilege by the District Court or whatever Court he might feel compelled to appeal to.

CONCLUSION

The Writ of Certiorari should issue and the judgment below should be reversed.

Respectfully submitted,

JOSEPH H. BOURGON,
Counsel for Petitioner.

Detroit, Michigan
March, 1958

APPENDIX

OPINION OF COURT OF APPEALS
(Decided January 2, 1958)

Before Simons, Chief Judge, Allen and Miller, Circuit Judges.

PER CURIAM. The principal question presented in this appeal is whether the District Court erred in refusing to compel obedience to a subpoena *duces tecum* served in behalf of plaintiff,[1] who had filed an action for wrongful discharge and interference with employment. The subpoena was served upon the special agent in charge of the Detroit Field Office of the FBI to compel production in court of certain FBI documents and records. The special agent, Charles W. Brown, a subordinate agent of the FBI, declined to produce the documents and records subpoenaed upon the ground that the Attorney General of the United States had determined under Executive Order 3229 of the Department of Justice to claim privilege as to the papers, etc. covered by the subpoena. The United States attorney was instructed by the Attorney General to present the claim of privilege to the United States District Court which thereupon refused to compel compliance with the subpoena. Under the applicable law this action of the District Court was correct. *Boske vs. Comingore*, 177 U. S. 459; *Uni'ed States ex rel Touhy vs. Ragen*, 340 U. S. 462; *Appeal of United States Securities and Exchange Commission*, 226 Fed. (2d) 501 (C. A. 6).

The complaint presented three counts, the first and second of which were abandoned by plaintiff and dismissed with prejudice. The third count prayed for damages alleged to have been caused by defendant's interference with plaintiff's employment and attempts to secure employment. Upon this feature of the case proof was offered to the effect that plaintiff was employed by defendant from January 6, 1947, until September 12, 1950. Plaintiff was later employed at the Ordnance Tank Automotive Center. He took a civil service examination in order to qualify for employment at the Ordnance Center. On October 24,

---

[1]The parties will be denominated as in the trial court.

1952, after a hearing before the Regional Loyalty Board at Detroit, plaintiff's suspension from work at the Ordnance Center was ordered in a letter of the Civil Service Commission which stated "there is a reasonable doubt as to the loyalty of Mr. Jackson to the Government of the United States. * * *" "Therefore he has been rated ineligible for Federal employment. * * *"

On appeal this action of the Civil Service Commission was confirmed and plaintiff was finally suspended from employment at the Ordnance Center on January 5, 1953.

Proof was offered that two of defendant's employees made statements to the FBI tending to create a question of plaintiff's loyalty to the United States. After a full hearing and the making of extensive findings and conclusions the District Court dismissed the third count of the complaint upon its merits. This action was not erroneous. It was not proved that defendant's officers or directors had instructed their employees to give information to the FBI with reference to the above matters and the alleged communications from defendant's employees were not shown to have any connection with the adverse loyalty report by the Regional Loyalty Board or the United States Civil Service Commission. Plaintiff admitted that he did not know that defendant had done or said anything to interfere with his employment at other places or at the Ordnance Tank Automotive Center, from which plaintiff was suspended after some six weeks work. Since no causal connection is shown between information given by defendant's employees to the FBI and the charges against plaintiff instituted in the Regional Loyalty Board and considered by the United States Civil Service Commission, the judgment of the District Court is supported by the record and the applicable law.

The judgment is affirmed.

OPINION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

The complaint in this action was in three counts. Counts I and II have already been disposed of so that only Count III remains to be here considered. Count III alleged that defendant, a former employee of plaintiff, has intentionally interfered with plaintiff's employment by stating falsely to employers and prospective employers of plaintiff that plaintiff is subversive and disloyal to the Government of the United States. Jurisdiction over the action is based on diversity of citizenship.

Before going into the merits of the case, a procedural problem which first arose on pre-trial discovery should be mentioned. Plaintiff caused to be issued a subpoena duces tecum which was duly served on Charles W. Brown, special agent in charge of the F.B.I. at Detroit, Michigan. The subpoena demanded that Mr. Brown bring with him the file, or group of files, containing information concerning plaintiff given to the F.B.I. by the defendant. The subpoena stated that delivery of these files in a sealed envelope to the Court for determination in camera and ex parte whether said information is material to the cause and whether it is of such a nature that it should not be admitted into evidence in open court would be deemed compliance with the subpoena. After receipt of this subpoena, Mr. Brown appeared specially by the United States attorney of this district and made a motion to quash the subpoena. This motion was granted. An application by the plaintiff to the United States Court of Appeals for an order directing this court to set aside the order quashing the subpoena was denied.

Another subpoena, in identical terms, was issued and served on Mr. Brown calling for him to appear at the trial of this action. Mr. Brown appeared in response to this subpoena and was sworn as a witness, but failed to bring with him any of the documents, or files demanded. It was conceded by Mr. Brown that he was in physical control of the records referred to in the subpoena, but he stated that he had been ordered not to produce them by the United States Attorney General in accordance with Department of Justice Order No. 3229. The Attorney General

specifically directed Mr. Brown not to deliver the documents to the court for examination by the trial judge for the purposes set forth in the subpoena, or for the purpose of determining whether they were covered by Executive Order No. 3229. It was specifically the claim of the witness that the trial judge had no authority to order the witness to submit the documents to the trial judge so that the trial judge could review the opinion of the witness as to whether the documents were covered by the Attorney General's order.

Mr. Brown testified that some or all of the documents contained in the file referred to were open to inspection and had been seen by various agents in the Bureau, including clerks and typists. He testified further that information from such files is customarily furnished to governmental agencies which, in the opinion of the F.B.I., had an interest in the contents of the file.

In spite of these facts, it was further claimed by Mr. Brown that the court was without authority to order the production of the documents for the purpose of determining whether the Attorney General had waived the claimed privilege.

The trial judge declined to order the witness to produce the documents referred to in the subpoena and whatever evidence may have been contained in the file was not available to the plaintiff. Plaintiff, with the consent of the defendant, withdrew his demand for a jury trial and proceeded with a trial to the court.

Evidence was introduced showing the following facts. Plaintiff was employed by the defendant from January, 1947 to September, 1950. In the spring of 1950, Philip Hommer and Angelo J. Palmer, employees of the defendant, in response to a specific inquiry by F.B.I. agents, told the agents that plaintiff was closely associated with certain named employees at the defendant's Leland Street (Detroit) plant, who had been Communist Party members and that they suspected plaintiff of having distributed The Daily Worker in one of the defendant's plants in Detroit.

In the fall of 1950 and again in the spring of 1951, in response to further specific inquiries by F.B.I. agents, Philip Hommer made further statements to the F.B.I.

generally reaffirming what he had said before about the plaintiff and furnishing the F.B.I. with certain leaflets and handbills which the F.B.I. requested.

On August 6, 1951, plaintiff was appointed to a position in the Federal Classified Service and commenced work at the Ordnance Tank Automotive Center at Centerline, Michigan. In March or April, 1952, plaintiff was notified that the United States Civil Service Commission had received certain information tending to reflect on his loyalty to the United States Government. In May, 1952, plaintiff, accompanied by his attorney, appeared before the Regional Loyalty Board and was given a hearing on charges that he may have been a member of, affiliated with, or in sympathetic association with the Communist Party. Specifically, the information received by the commission was stated to be that (1) plaintiff had been the means by which a Communist publication was introduced into the Allen Industries plant, and (2) he was closely associated with certain named persons known to be Communists, and (3) he had attended a meeting of the auto sections of the Communist Party.

On November 4, 1952, Plaintiff was suspended from his job at the Tank Arsenal pursuant to a finding by the Regional Loyalty Review Board that there was a reasonable doubt as to his loyalty to the Government of the United States. Plaintiff's employment was terminated finally on January 5, 1953.

Since the termination of his employment at the Detroit Tank Arsenal, plaintiff has earned a total sum of $5,856.71. Had plaintiff continued to be employed at the Detroit Tank Arsenal, he would have earned a total sum of $12,-274.00.

Plaintiff rested its case and defendant made a motion to dismiss under Rule 41(b).

The court here reaffirms its refusal to compel compliance with the subpoena duces tecum served on Mr. Brown. Weighty constitutional problems, such as this, should be avoided when cases may be disposed of on other grounds. In this case, the F.B.I. files demanded could have provided plaintiff only with corroborative evidence of what the defendant's agents told the F.B.I. and evidence that the in-

formation so obtained was communicated to the Civil Service Commission. Had the plaintiff otherwise proved his case, the court might well have taken judicial notice of the fact that information received by the F.B.I. is made available to other agencies of the government, such as the Civil Service Commission and the Loyalty Review Board.

Plaintiff has, however, fallen far short of proving his case. To make out a case of intentional or malicious interference with employment, plaintiff must show that the acts done by defendant, which resulted in plaintiff's discharge, were done with the intent or purpose of bringing about plaintiff's discharge. 30 Am. Jur. 67, 86 C. J. S. 959 et seq. Here it is clear that the statements made by defendant's agents to the F.B.I. could not have been intended by them to interfere with any employment of plaintiff. The first two conferences with F.B.I. agents were held while the plaintiff was still employed by the defendant and at the time of the last conference with the F.B.I. agents, it does not appear that defendant's agents knew where plaintiff was working or that he might be seeking employment from a governmental agency.

Upon the whole record, therefore, plaintiff has failed to prove his case by a preponderance of the evidence, and defendant's motion to dismiss must be granted. *Bach vs. Friden Calculating Mach.*, 148 F. 2d 407.

This opinion is adopted as the Court's Findings of Fact and Conclusions of Law.

Arthur F. Lederle,
Circuit Judge.

Dated: December 19, 1956.

DEPARTMENT OF JUSTICE EXECUTIVE ORDER NO. 3229

When a United States Attorney or any other officer or employee of the Department of Justice is served with a subpoena or order for the production or disclosure of materials or information contained in the files of the Department, the United States Attorney, or such other attorney as may be designated, will appear with the person upon whom the demand is made and inform the court or other issuing authority that such person is not authorized to produce or disclose the materials or information sought. Time will be requested within which to refer the subpoena or order to the Attorney General and the United States Attorney or other attorney designated will refer the court to Department Order No. 3229, Revised, as published in the Federal Register (Vol. 18, p. 1368, Mar. 10, 1953). Advice as to such subpoena or order will be given immediately to the Attorney General without awaiting court appearance.

In the event the court declines to defer a ruling until instructions from the Attorney General have been received, or in the event the court rules adversely on a claim of privilege asserted under instructions of the Attorney General, the person upon whom such demand is made will, pursuant to Order No. 3229 Revised, respectfully decline to produce the material or information sought. (See United States ex rel. Touhy vs. Ragen, 340 U. S. 462).

Simon E. Jackson

EXCERPTS FROM TRANSCRIPT

(1)

Excerpts of proceedings had and testimony taken before Honorable Arthur F. Lederle, Chief District Judge, at Detroit, Michigan on July 26, 1956 through August 1, 1956.

* * *

(5)

SIMON E. JACKSON, sworn.

DIRECT EXAMINATION
By Miss Edwards:

Q. What is your name, witness?
A. Simon E. Jackson.
Q. Are you the plaintiff in this case now before the Court?
A. I am.

* * *

(12)

Q. Were you appointed to a job in the classified service?
A. I was. I was appointed to a job in the Tank Plant.

* * *

(25)

THE COURT: Miss Edwards, I see Mr. Brown and Mr. Woods here. Maybe we can take care of that matter while Mr. Markus is reading that exhibit.
You can step down, Mr. Jackson.

* * *

(30)

THE COURT: I find that I do on occasions like this.
Is it conceded that the subpoena was served on Mr. Brown?
MR. WOODS: Yes, sir.

Charles W. Brown

THE COURT: Is it conceded that Mr. Brown has the custody of the records sought?

• • •

(31)

MR. WOODS: I think he probably has physical control of such records as exist, your Honor, yes.

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(42)

MISS EDWARDS: There has been no formal claim of privilege filed by the Attorney-General.

THE COURT: I think there has.

MR. WOODS: Yes, sir.

THE COURT: I think Paragraph 4 of the Motion to Quash constitutes a claim of privilege.

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(48)

CHARLES W. BROWN, sworn.

DIRECT EXAMINATION
By Miss Edwards:

Q. What is your name, witness?

A. Charles W. Brown.

Q. And what is your occupation?

A. Special Agent in charge, Federal Bureau of Investigation, Detroit, Michigan.

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(51)

Q. Do you have these specific files relating to Simon

(52)

Edward Jackson under your control?

A. We have certain files in our office here that are under my control, yes, that relate to him.

Q. That relate to Simon Edward Jackson?

A. Yes.
Q. Did you bring those files with you?
A. No.
Q. Why did you not bring those files?
A. In view of an existing Executive Order, 3229, signed by the Attorney-General of the United States January 13, 1953, which declares the records and information of the FBI to be confidential.

* * *

Q. (By Miss Edwards): Did you send a copy of the

(53)

subpoena, the subpoena or a copy of the subpoena to the Attorney-General?
A. Of this subpoena, no.

* * *

(62)

Q. (By Miss Edwards): Now, Mr. Brown, can you state briefly the general nature of the contents of that file, and we will start with general terms?
A. No, under the order.

* * *

(64)

THE COURT: Can you disclose the nature or contents of any documents given to your agents by anyone connected with the Allen Industries?
A. Under this purpose that I am here for right now, the Executive Order would prevent that.
THE COURT: Can you disclose whether you have any signed communications in this file which came from the Allen Industries, limiting it to the Allen Industries?
A. No, sir.

* * *

THE COURT: All right.
Q. (By Miss Edwards, continuing): With reference to this question, as to whether you could disclose these various

items, and I refer to the four or five immediately preceding questions, do you mean by your answers that you cannot disclose them to this court in answer to this subpoena at this time?

A. Yes, that is it.

Q. All right. Can you disclose such records and files

(65)

and reports to other agencies of the Government, such as the Civil Service Commission?

A. We are, under our responsibility, directed to furnish certain Government agencies, or, other Government agencies, wherein they have an interest in the matter, — we are responsible for furnishing them certain information.

Q. Now, can you furnish it to any Government agency?

A. If that Government agency has an interest in the matter — a Federal Government agency you have in mind — Federal?

Q. That is right, let us take any Federal Government agency? Could this information be furnished to any government, any Federal agency?

A. If they have an interest in the matter, yes.

THE COURT: Let us stop there a minute.

Who decides whether, using your language, they have an interest in the matter?

A. Well, should I try to answer that, Judge?

THE COURT: Yes.

A. For example, if one other agency, that is, a Federal Government agency — if we are investigating under the Loyalty Program an individual in that department, then they would have an interest in it, because he worked there, and it is their responsibility to take the administrative action, if they want to take any, based on facts developed by the FBI, so they would have an interest in that case, and, naturally, we would send them information

(66)

in our file.

THE COURT: Let me see if I can understand this. If I can get this straightened out, it might save me some time. Let us take a field that I know a little more about.

Assume that you had been investigating a matter relating to a violation of the bankruptcy laws, and you had acquired information about funds belonging to the bankrupt estate.

As you interpret the order, could you disclose to the referee in bankruptcy the information in the file without authority from Washington?

A. May I ask you something?

THE COURT: Yes.

A. That is a Federal Referee in Bankruptcy?

THE COURT: Yes, Federal Referee in Bankruptcy.

A. Well, he doesn't constitute a Government agency, as such.

THE COURT: No, that's right. He belongs to the judicial department.

A. That's right. There is a question about that, sir, and I would not furnish that to him unless I consulted with the headquarters of our Bureau.

* * *

(67)

Q. Now, is the Civil Service department one of the agencies to which you furnish this information?

A. We do furnish information to Civil Service in connection with those matters that we investigate wherein they are interested, yes, but we do not follow the policy of furnishing everything to Civil Service.

* * *

(78)

Q. All right, now, what I am asking is whether the At-

(79)

torney General has examined that file, that data, those papers, and so on, which are in your control since you received this subpoena?

A. He has not been to the State of Michigan since this subpoena was received to examine this particular file.

Q. Well, I want to ask the same question as to the

Deputy Attorney General: Has he ever examined the file in Michigan?

A. Since the receipt of this subpoena?

Q. Yes.

A. Not to my knowledge.

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(82)

THE COURT: I will decline to cite the witness for contempt, and you may, of course, assign error to the Court's refusal to permit you to get the evidence.

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(83)

MR. WOODS: All right. Then, you are saying, then, in effect, your Honor, that you refuse to cite Mr. Brown for contempt for failure to produce based upon his privilege?

THE COURT: Yes.

MR. WOODS: Thank you.

THE COURT: That is what it amounts to. Not exactly his privilege. The privilege of the Attorney General.

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(267)

ANGELO J. PALMER, adverse witness, sworn.

CROSS EXAMINATION
By Miss Edwards:

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(279)

Q. What is your name, witness?

A. Angelo J. Palmer.

• • •

Q. What is your present occupation?

A. Personnel Manager of the Allen Industries Leland Plant.

• • •

(281)

Q. Have you ever talked with the FBI with reference to Mr. Jackson?

A. Yes, I have.

Q. When?

A. It was in the Spring of '50.

• • •

Q. (By Miss Edwards): And where did you talk with them?

A. The labor relations office.

Q. That was before Mr. Jackson was discharged?

A. Yes.

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(282)

Q. Specifically, what did you tell the FBI about Mr. Jackson?

A. That he was known to associate with Jimmy Walker, who was an admitted Communist, and myself, Gerald Boyd was in the association, and always in the small circle with those known Communists, and that it was brought to my attention that when he came into the Riopelle warehouse, the Daily Worker showed up.

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(284)

Q. Now, did you ever see Mr. Boyd in any Communist activity?

A. No.

Q. Did you ever hear what Mr. Walker and Mr. Jackson talked about when they were together?

(285)

A. No.

Q. Did you ever hear what Mr. Boyd and Mr. Jackson talked about when they were together?

A. No.
Q. Is it your claim that it is a Communist activity to engage in a decertification proceeding?
A. Is it?
Q. Yes.
A. I would think so.
Q. You think it is?
A. My personal opinion, yes.

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(296)

PHILIP A. HOMMER, Adverse Witness, sworn.

CROSS EXAMINATION
By Miss Edwards:

(297)

Q. What is your name, witness?
A. Philip A. Hommer.

• • •

Q. (By Miss Edwards): What is your occupation?
A. I am Labor Relations Supervisor at Allen Industries Leland plant, Detroit, Michigan.

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(299)

Q. How long have you been employed by Allen Industries?
A. Since April 25, 1949.

• • •

(301)

Q. So Mr. Tobias — incidentally, what is his job with Allen?
A. At that time he was vice-president and general manager.

Philip A. Hommer

Q. What is he now?
A. He is president now.
Q. Now, at the time you first talked to Mr. Tobias, then he knew you were a former labor union official?
A. That is correct.
Q. Did he also know that you were a member of the Communist Party?
A. No, he did not.

(302)

Q. When did he find that out?
A. Shortly after the strike in 1950.
Q. Then you went to work at Allen in 1949, in April, and worked there for almost a year, is that correct, without having revealed your former associations with the Communist party?
A. That is correct.

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(303)

Q. (By Miss Edwards): How long did you tell them you had been a Communist?
A. I told them several years. I gave them a pretty detailed history.

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(304)

Q. Under what circumstances do you claim you terminated your affiliation?
A. I resigned from the union and the party together on November 1 or October 30, either date, 1950.
Q. Now, you say you resigned. To whom did you send your resignation?
MR. MARKUS: What was that date again?
A. October 30th.
MR. MARKUS: What was the year?
A. I'm sorry. I mis-quoted the year. I said 1950. It was 1947.

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(312)

Q. Do you recall talking with the FBI or any other governmental agency about Mr. Jackson?

A. I remember talking to the FBI.

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(313)

Q. All right. Now, when did you talk with the FBI?

A. The first contact I had with the FBI with reference to Mr. Jackson was in the spring of 1950, shortly after the strike.

Q. And in what connection did you have that contact?

A. They came to our plant, said that they had heard that we had had a strike there, and that they were making a routine investigation.

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(314)

Q. (By Miss Edwards): When you talked with the FBI, were you talking with them in your capacity as Labor Relations Director of Allen Industries?

A. That is a hard question to answer.

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Q. Was this in the course of your day's work?

A. It is a little different than the normal routine, but I would say yes.

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(315)

Q. Well, now, was the FBI there on more than one occasion?

A. They were.

Q. And when was that? When was the second occasion?

A. They were there again the fall of 1950.

Q. In the fall of 1950. Were they there subsequent to that time?

A. They were there again in the spring of '51.

Q. And later?

A. They have been there many times since.

Q. They have been there many times. Now, did anyone appear at any time and identify themselves as being from the Civil Service detail?

A. I recall no incident of that kind.

Q. You testified to that, did you not? Now, again, I refer you to page 10 of the deposition taken on May 17.

(316)

1954, in this building, and I asked, "What was the statement made by the FBI to you?" and you said, "I beg your pardon"? I asked you again, "What was their statement to you?" and you said. "They identified themselves as FBI men, Civil Service detail. They wanted information."

Now, what occasion were you referring to when you said that?

A. I must have misunderstood your question when you took the deposition, because I don't remember nothing about any Civil Service detail.

The fact is I didn't even know if there was a Civil Service detail.

Q. You made that specific answer, didn't you?

A. If I did, I was in error; I didn't understand your question.

Q. When was the last time that the FBI was at your plant that you discussed Jackson with them?

A. That I discussed Mr. Jackson?

Q. Yes.

A. I don't recall ever discussing Mr. Jackson after the spring of 1951.

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(318)

Q. Now, specifically, what did you give them about Simon Jackson?

A. Just that he was active in the strike, and that we suspected him of being more than normally close to Walker, Boyd and Hilt.

Q. You say that you suspected him of being —

A. Yes, that is right.

Q. Now, again, in this deposition, I asked you, did you tell the FBI that he was closely —

MR. MARKUS: What page are you reading from?

A. Page 11 of the second half of the deposition. (Reading):

"Q. Did you tell the FBI that he was closely associated with James Walker, Marie Hilt, Marie Alexander, Gerald Boyd, Ernestine Williams, or any of them?"

And you said, "Yes, I did."

A. I did.

(319)

Q. Now, you want to claim that you suspected him of being associated —

A. (Interrupting) No, I knew he was associated, and I suspected him of being more than merely associated.

Q. Oh. Now, what did you base your suspicions on?

A. The fact that they seemed to be in such extensive collaboration with each other.

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(320)

Q. Did you know what they were talking about?

A. Not exactly.

Q. Could you hear them talk?

A. No, not usually.

Q. Well, did you ever hear them talk?

A. In walking past them, I would sometimes catch short snatches of conversation. I couldn't add it up to anything.

Q. Did you tell the FBI that they were closely associated in Communist activities?

A. I didn't tell them they were. I told them I thought they might be.

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(321)

Q. Now, the second time the FBI came, what did you tell them with regard — pardon me — first, is that all you told the FBI with regard to Jackson?

Philip A. Hommer

A. I told them that he was suspected of distributing the Daily Worker at our plants.

Q. And on what did you base that suspicion?

A. On the fact that they seemed to show up in the plants, especially at the Riopelle warehouse, immediately after he had made a delivery.

(322)

Q. Did you ever see him —

A. (Interposing): No, I never did.

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(323)

Q. Now, who were the people that Jackson associated with that you told the FBI were Communists?

A. James Walker, Marie Hill, Jerry Boyd, Ernestine Williams, James Anderson. I don't recall any others, if any.

Q. I think you named Marie Alexander before.

A. I believe I did.

Q. Was that a mistake?

A. No, I don't believe so.

Q. And you didn't name James Anderson?

A. I didn't name James Anderson.

Q. No.

A. Well, he was one.

Q. He was one. How do you know that James Walker was a Communist as of 1948?

• • •

A. As of 1948, I don't know that he was.

(323)

Q. Then, it is entirely possible that he was in exactly the same state as you were at that time, is that correct?

A. It could be.

• • •

Q. Now, would you make the same statement with re-

(324)

gard to Marie Hilt, Ernestine Wilson, James Anderson, Marie Alexander and Jerry Boyd?

A. Not all of them, no.

Q. Now, after you went to the plant and you knew that some of them were still Communists, is that correct?

A. I did.

Q. You didn't know it about Walker?

A. I was quite sure of it about Walker.

Q. But you didn't know it?

A. Not first-hand. He was getting some pretty good write-ups in the Daily Worker.

Q. You were reading the Daily Worker at that time?

A. I read some of those I picked up around the plant.

Q. Oh, like Jackson did. What did you know about Jerry Boyd?

A. I knew he was active in the party.

Q. How did you know that?

A. By the same token, articles in the —

Q. (Interposing): Daily Worker?

A. Daily Worker, and in the Free Press or Times for that matter.

Q. When were these articles in the Times?

A. I couldn't recall the date, but there was some in there to the effect that he was a candidate for office or something. I don't recall.

Q. Which office, where?

(325)

A. I don't recall.

Q. You really don't know enough about that?

A. I don't recall the details, no.

Q. And you don't know what the date was, whether it was at the time Mr. Jackson worked there and some other time, is that right?

A. It could have been before: I don't recall exactly.

• • •

Philip A. Hommer

(326)

Q. Now, how did you know that Marie Alexander had ever been active in the Communist movement?

A. I saw her at the meeting the night she joined the party.

Q. What night was that?

A. If I remember right, it was in the summer of 1946.

Q. Do you know that she continued her membership —

A. (Interrupting): No, I don't.

Q. — after 1947?

A. No, I don't.

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(327)

Q. With reference to Marie Hilt, how did you know that she had been an active party member?

A. She was in the same cell that I was.

Q. Do you know if she continued her affiliation after you did?

A. No, except that I do know she was active in the National Negro Congress.

• • •

Q. How do you know that Ernestine Williams was active?

A. I don't. I know she was a member, because at one time I even had her membership card in my possession.

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(328)

Q. And do you know if her activity continued beyond —

A. (Interposing): I do not.

Q. So you don't know whether she was a Communist at the time you saw Jackson talking to her?

A. I did not know.

• • •

Q. Then you never did see Jackson associate with James Anderson?

A. I never did, no.

Philip A. Hommer

Q. All right.
A. I didn't say that I did, either.
Q. Well, perhaps not. I am just trying to find out.
Now, Mr. Hommer, you told the FBI that he was closely

(329)

associated with Communists on the strength of this information that you have given me; is that correct?
A. Mostly.
Q. Well, what else was there that you went on?
A. Well, the very type of activity that they engaged in.
Q. Well, is it your contention that a strike is a Communist activity?
A. If it is not conducted in conformity with accepted union principles, it would says yes.

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(330)

Q. Now, was the same group active in the strike that were active in the decertification proceeding?
A. Generally, yes.

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(331)

Q. Did you also tell the FBI that in this activity that Mr. Jackson was associated with some thirteen other people as to whom you had no reason to believe they were Communist?
A. I did.
Q. Did you discuss these other people with the FBI also?
A. I did, to the extent that they asked me. I don't recall just who they asked about.
Q. Now, this is all taking place in the meeting in the spring of 1950, is that correct?
A. That is the way I understand it.
Q. You say they came back in the fall of 1950?
A. That is right.

Philip A. Hommer

(332)

Q. Did you add anything further to the information that you had given the FBI in the spring?

A. Maybe a little, very little. I don't exactly recall. I showed them my leaflet file again. They took certain leaflets, and they questioned anything that was different from the previous time.

• • •

Q. And you said they came back in the spring of 1951?

A. That is right.

Q. What prompted the inquiry?

A. Well, I don't know. They were different men than I had seen previously, showed their credentials. They started to go through the same routine that I had gone through with the other men. Before the meeting proceeded too far, I showed them the leaflet file. They wanted some of the leaflets, and I told them as far as I was concerned they should have a pretty complete file down at the bureau, that if they wanted these leaflets, they could have them, and they left.

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(340)

Q. Is the Daily Worker still read in the Allen Industries plant?

A. If it is, I haven't seen it.

Q. When did it cease to be circulated?

A. I haven't seen — I don't believe I have seen a Daily Worker in our plant since after the strike — since the strike.

Q. And you haven't seen it, to the best of your recollection, since 1950, early 1950? You do mean January, 1950 strike, don't you?

A. I can't say for sure, but I don't believe. I know it

(341)

was somewhere shortly in that period when it ceased to appear any more.

Q. And you are referring to the January, 1950 strike?

A. That is the only strike we have had.

Q. That is the only one we have had, all right.

Now, what was the attitude of the company with regard to its circulation before that time?

A. They were definitely opposed to it. We were trying to find out how it got in, who distributed it. We were never successful in pinpointing it.

We did have employees complaining about it. Some of them were even brought to our office by employees complaining about the paper being in the plant. They felt we should do something about it.

Q. But you never did find out how it got into the plant?

A. I never did personally, no.

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(348)

Q. When did your conference with the FBI in this building take place?

A. I believe it was about mid-summer of 1951.

• • •

SUPREME COURT. U. S.

MAY 19 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 889

SIMON JACKSON,
Petitioner,

vs.

ALLEN INDUSTRIES, INC., a Delaware Corporation,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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STATUTE AND ORDER INVOLVED

The statute involved is Section 22 of Title 5 of the United States Code which reads as follows:

> "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for

> the Government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it."

Department of Justice Executive Order No. 3229, Revised, as cited by Petitioner in his petition for Writ of Certiorari and as set forth in Petitioner's Appendix, is also involved.

QUESTION PRESENTED

Respondent submits that there is only one question presented by the petition for Writ of Certiorari, namely, "Is a subordinate employee of the Department of Justice subject to a citation for contempt of court when, in reliance upon an Executive Order promulgated by the Attorney General of the United States, he, in a civil suit between private litigants, as instructed by the Attorney General, refuses to produce records of the Federal Bureau of Investigation ordered produced under subpoena *duces tecum*."

Petitioner in his brief filed with the Sixth Circuit Court of Appeals actually encompassed the three questions which he now urges in his petition for Writ of Certiorari in the single question, "Did the court err in refusing to compel obedience to the subpoena served in behalf of plaintiff on witness Brown, special agent in charge, Federal Bureau of Investigation, at Detroit?"

STATEMENT

(Figures in parentheses followed by the letter "a" refer to pages of Appellant's (Petitioner's) Appendix; figures followed by the letters "AC" refer to pages of Amicus Curiae Appendix; figures followed by the letter "b" refer to pages of Appellee's (Respondent's) Appendix, all as filed with the United States Sixth Circuit Court of Appeals and filed with the Supreme Court as the Record pursuant to Rule 21(1).)

Witness Charles W. Brown, special agent in charge of the FBI at Detroit, Michigan, was first served on behalf of Petitioner by subpoena *duces tecum* on or about October 25, 1955, seeking production of FBI records (1 and 2 AC). A Motion to Quash that subpoena was filed on behalf of witness Brown by the United States Attorney (4 and 6 AC). At the hearing on said motion, a letter directed to the United States Attorney was read into the Record (6 and 7 AC). The District Judge entered an order quashing the subpoena (7 and 8 AC). An application by Petitioner to the Six Circuit Court of Appeals for a Writ of Mandamus, for the purpose of reviewing that order by the District Court, was denied by order of the Sixth Circuit Court of Appeals in its case No. 12809 (8 and 9 AC).

Subsequently, witness Brown was again served with a subpoena *duces tecum* (2 and 3 AC). A Motion to Quash that subpoena was again filed on his behalf by the United States Attorney (16a). Brown communicated the contents of the subpoena to the Department of Justice and was instructed, on authority of Executive Order 3229, to refuse to produce the records called for by the subpoena (30a, *et seq.*) Brown appeared at the trial before the District Court, was sworn as a witness, and, with due respect, informed the Court of his instructions (40a, *et seq.*). The Court declined to hold witness Brown in contempt (57a-60a).

ARGUMENT

The question, if there be one, presented by the Record in this case, is a narrow one. Respondent respectfully submits that it is controlled by

> *U. S. ex rel. Touhy v. Ragen,* 340 U. S. 462 and *Boske v. Comingore,* 177 U. S. 459.

The relevant facts in the case presented by the petition for Writ of Certiorari are such as to be substantially indistinguishable from those present in *Touhy v. Ragen, supra,* where this Court said:

> "We find it unnecessary, however, to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court. It is true that his subordinate, Mr. McSwain, acted in accordance with the Attorney General's instructions and a department order. But we limit our examination to what this record shows, to-wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from making such submission by his superior through Order No. 3229. The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release Department papers. Nor are we here concerned with the effect of a refusal to produce in a prosecution by the United States or with the right of the custodian of government papers to refuse to produce them on the ground that they are

state secrets or that they would disclose the names of informants.

"We think that Order No. 3229 is valid and that Mr. McSwain in this case properly refused to produce these papers. * * *"

Petitioner apparently premises his petition for Writ of Certiorari on the grounds that one of two cases, or perhaps both, have either overruled or modified this Court's decision in *Touhy v. Ragen, supra.* Those decisions, as cited by Petitioner, are

U. S. v. Reynolds, 345 U. S. 1 and
Roviaro v. U. S., 353 U. S. 53.

It is respectfully submitted that any such contention is obviously fallacious.

The *Reynolds* case concerned a suit under the Tort Claims Act to which the United States was a party defendant. No subordinate official of the United States was served with a subpoena *duces tecum* or refused to produce documents pursuant to such subpoena. Rather, the case involved a motion for discovery directed to the United States, as a party to the action, under Rule 34 of the Federal Rules of Civil Procedure and the action taken by the District Court upon the Government's failure to produce the documents in question was pursuant to Rule 37(b)(2)(i). *Touhy v. Ragen, supra,* was cited by this Court in the *Reynolds* case in support of this Court's decision to dispose of the case upon narrower grounds than the broad propositions urged upon it for decision. There was no suggestion that the Court in any way considered *Touhy v. Ragen* as modified by the *Reynolds* case or, in fact, as applicable to the facts presented by that case.

Roviaro v. U. S., supra, was a criminal case involving a violation by defendant Roviaro of the narcotics laws.

It falls within the class of cases (all criminal cases) which hold, generally, that the Government may invoke "evidentiary privileges" only at the expense of letting the defendant go free, upon the basic principle that the Government, being the prosecutor of the criminal on the one hand and under a duty to see that justice is done on the other, should not undertake prosecution and then invoke governmental privileges which might deprive the accused of any matter relevant to his defense.

It should be obvious that both *Reynolds* and *Roviaro* are not in point as regards the facts of this case. This is a civil suit between private litigants. The subpoena *duces tecum* was not served upon or directed to the Attorney General but rather to "Charles W. Brown; Special Agent in Charge, Federal Bureau of Investigation." Brown communicated with the Attorney General, received his instructions, and followed them. So this case is simply one of a subordinate of the Attorney General obeying the lawful orders of the Attorney General. It is respectfully submitted that, under such circumstances, the District Court quite correctly refused to hold witness Brown in contempt upon his failure to produce certain records of the FBI called for by the subpoena *duces tecum*.

In summary, therefore, comment may be in order concerning the questions involved, as proposed by Petitioner in his petition for Writ of Certiorari:

> (a) The first question as proposed by Petitioner was never before the District Court and is not before this Court. As in *Touhy v. Ragen, supra*, we are not here "concerned * * * with the right of the custodian of government papers to refuse to produce them on the ground * * * that they would disclose the names of informants."

(b) The second question as proposed by Petitioner was likewise never before the District Court and is likewise not before this Court. The United States is not a party to the action. The Attorney General was never before the Court. The "privilege" afforded the witness by Order No. 3229 was not only claimed by the witness under oath on the witness stand but also on the witness' behalf in the Motions to Quash filed by the United States District Attorney.

(c) The third question proposed by Petitioner is likewise not before this Court. The Attorney General was never subpoenaed. No effort was made, in spite of the plain meaning expressed in the majority opinion and concurring (not dissenting) opinion of this Court in *Touhy v. Ragen, supra,* to secure production of the documents desired through service upon the Attorney General himself. Entirely apart from questions which might conceivably be raised should the Attorney General have arbitrarily failed to produce documents of the FBI after service upon him of proper judicial process calling for their production, how can there be a denial of "due process of law" when available process of law has not been utilized by Petitioner?

Although Respondent respectfully submits that this petition for Writ of Certiorari should be denied on the basis of the foregoing alone, it may, nevertheless, be appropriate to point out in brief summary that wholly aside from the "FBI file" issue, Petitioner failed to make out a case of interference with employment, which failure is readily apparent from the whole Record and is reflected in both the opinion of the District Court and the opinion of the Sixth Circuit Court of Appeals.

The tort of interference with employment is one of the so-called "intentional torts" and the District Court found no such intent on the part of Respondent. Furthermore, even if this were not the case the whole Record affirmatively establishes Respondent's justification or privilege. Furthermore, under the laws of the State of Michigan there must be express corporate authority or ratification shown to make words of corporate employees, defamatory in nature, actionable. See

Flaherty v. Maxwell Motor Co., 187 Mich. 62 (1915);

Robertson v. New York Life Insurance Co., 312 Mich. 92 (1945).

The Record is completely devoid of any showing of such atuhorization by Respondent to its employees who allegedly made the statements in question. Finally, there is no showing in the Record that the suspension of Petitioner through the Loyalty Board was caused by any report made to the Loyalty Board by the FBI or based on any report received by the FBI from Respondent or its employees. In all essential elements of the action, there was a failure of proof by Petitioner.

CONCLUSION

For the foregoing reasons its is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Freud, Markus, Lubbers & Slavin,
Counsel for Respondent.

Detroit, Michigan,
May, 1958.

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No. 889

In the Supreme Court of the United States

OCTOBER TERM, 1957

SIMON JACKSON, PETITIONER

v.

ALLEN INDUSTRIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. 1a–2a), is reported at 250 F. 2d 629. The opinion of the district court (Pet. App. 3a–6a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1958. The petition for a writ of certiorari was filed on April 2, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Attorney General may, by regulation, withdraw from his subordinates authority to release

departmental files in response to a subpoena *duces tecum*.

ORDER INVOLVED

Department of Justice Order No. 3229, 18 F. R. 1368 is printed in the Appendix to the petition (Pet. App. 7a).

STATEMENT

This suit was instituted by the petitioner to recover damages resulting from respondent's alleged willful and malicious interference with petitioner's employment relationship (R. 4–5). The Government was not a party. The substance of petitioner's complaint is that respondent, petitioner's former employer, willfully and maliciously interfered with petitioner's employment relationship with the United States by giving false information concerning his loyalty to the Federal Bureau of Investigation, as a result of which petitioner was dismissed from his Government job [1] (R. 4–5).

In the course of the litigation, a subpoena *duces tecum* dated October 25, 1955, was directed to Herbert Brownell, Jr., Attorney General of the United States, and Charles W. Brown, Special Agent In Charge, Federal Bureau of Investigation, Detroit, Michigan (R. 102–103). The subpoena addressed to Mr. Brownell and Mr. Brown commanded them to appear at a stated time to testify on behalf of petitioner and to bring with them the file or group of files contain-

[1] The complaint also contained two additional counts, one for breach of an employment agreement and another for defamation (R. 2–4). However, these counts were dismissed at the end of petitioner's affirmative case (R. 169) and no appeal was taken from this ruling.

ing information given by respondent or its employees to the F. B. I. with reference to petitioner (R. 102). The subpoena was never served on Herbert Brownell, Jr. (R. 106, 108–109). The United States Attorney, on behalf of the F. B. I. agent, moved to quash the subpoena *duces tecum* on the basis of Department of Justice Order No. 3229, 18 F. R. 1368 (R. 105–107). This order (Pet. App. 7a) provides that subordinate officers of the Department of Justice are not authorized to release or produce files of the Department of Justice and that, when served with a subpoena *duces tecum,* the United States Attorney is to appear on behalf of the official served with the subpoena and respectfully direct the court's attention to the order. In support of the motion to quash, the United States Attorney submitted a letter he had received from then Assistant Attorney General Burger advising that the Attorney General had reviewed the question presented by the issuance of the subpoena in this case and had decided to invoke the claim of privilege as to the documents and information referred to in the subpoena (R. 107–108). The letter concluded by requesting the United States Attorney to inform the court that the subpoenaed official was not authorized to produce the documents and files (R. 107–108). On December 30, 1955, the subpoena *duces tecum* served on Charles W. Brown was quashed (R. 108–109.[2]

[2] Petitioner filed a motion in the Court of Appeals for the Sixth Circuit for leave to file a petition for a writ of mandamus or certiorari directing the district court to set aside the order quashing the subpoena. The Court of Appeals ruled that the quashing of the subpoena was nothing more than an evidentiary ruling and that the correctness of the ruling must await review by appeal after final judgment (R. 109–110).

On July 23, 1956, a subpoena *duces tecum* substantially identical to the one just described was again directed to and served on Charles W. Brown (R. 103–104). Again the Government moved to quash the subpoena *duces tecum* on the same grounds as the earlier motion (R. 16–17). On this occasion, the court refused to compel obedience to the subpoena (R. 22, 59–60).

After a full trial on the merits before the district court sitting without a jury, the action was dismissed (R. 24). In its opinion dismissing the action, the court reaffirmed its refusal to compel Mr. Brown to produce the subpoenaed documents and files (Pet. App. 3a–6a). On the merits, the court found that the petitioner had "fallen far short of proving his case" (Pet. App. 6a). Moreover, the court also found that this failure of proof could not be remedied by the files and documents sought by the subpoena because the statements allegedly made by the respondent could not have been made with the intention of interfering with petitioner's employment relationship with the United States, since he had not yet been employed by the Government at the time the statements were made (Pet. App. 5a–6a).

On appeal, the Court of Appeals for the Sixth Circuit ruled *per curiam* that the district court correctly refused to compel compliance with the subpoena *duces tecum*. The Court of Appeals also affirmed the district court's ruling on the merits.

ARGUMENT

In his petition for certiorari, petitioner argues only that the subpoenaed documents are not privileged.

However, the scope of governmental privilege is not a question which is open on this record. Whether particular departmental files are privileged may not be tested by serving a subordinate official who, by valid regulation, has no authority to produce *any* departmental files, and who, in legal contemplation, is not the custodian of the documents. The Attorney General is the custodian of the documents and is the official under whose instructions the F. B. I. agent refused to produce. However, the Attorney General was not served with the subpoena. Thus, the propriety of his action in invoking the privilege is not before the Court. The only question presented here is the validity of the Attorney General's order withdrawing from his subordinates authority to release departmental papers and, in *Touhy* v. *Ragen,* 340 U. S. 462, a case on all fours with the instant case, this Court ruled that the order here in question is valid.

In the *Touhy* case, an F. B. I. agent was served with a subpoena *duces tecum* in a habeas corpus proceeding brought by a prisoner against his warden. Production was refused on the basis of Department of Justice Order 3229 prohibiting subordinate officials of the Department from releasing departmental files.[3] This Court ruled that the F. B. I. agent properly refused to produce the documents and found it unnecessary "to consider the ultimate reach of the authority of the Attorney General to refuse to produce at a

[3] This order is the same order involved in this case, although, since the decision in the *Touhy* case, it has been revised in respects not here material. *Cf.* 11 F. R. 4920 *with* 18 F. R. 1368.

court's order the government papers in his possession, for the case as we understand it raises no question as to the power of the Attorney General himself to make such a refusal. The Attorney General was not before the trial court" (340 U. S. at 467). The Court limited its examination "to what this record shows, to wit, a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate is prohibited from making such submission by his superior through Order No. 3229. The validity of the superior's action is in issue only insofar as we must determine whether the Attorney General can validly withdraw from his subordinates the power to release department papers." (*Ibid.*)

The Court then found that the order was a valid exercise of authority under 5 U. S. C. 22,[4] stating:

> * * * When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious. * * * [340 U. S. at 468.]

It is thus clear that *Touhy* v. *Ragen* is dispositive of the case at bar, and that the courts below correctly

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[4] 5 U. S. C. 22 provides as follows:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

disposed of the question of Brown's refusal to respond to the subpoena *duces tecum.*[5] Accord, *Boske* v. *Comingore,* 177 U. S. 459 and *Appeal of the United States Securities and Exchange Commission,* 226 F. 2d 501 (C. A. 6), both sustaining the validity of similar orders in other agencies and ruling that in similar circumstances the validity of the order was the only question presented by the record. See also, *Ex parte Sackett,* 74 F. 2d 922 (C. A. 9); *In re Valecia Condensed Milk Co.,* 240 Fed. 310 (C. A. 7); *Stegall* v. *Thurman,* 175 Fed. 813 (N. D. Ga.); *In re Weeks,* 82 Fed. 729 (D. Vt.); *Harwood* v. *McMurtry,* 22 F. Supp. 572 (W. D. Ky.); *Walling* v. *Comet Carriers, Inc.,* 3 F. R. D. 442, 443 (S. D. N. Y.).

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[5] Petitioner's passing suggestion (Pet. 11) that the authority of the *Touhy* case has been weakened by *United States* v. *Reynolds,* 345 U. S. 1, is without support in the *Reynolds* case itself. The *Reynolds* case involved the Government's privilege to resist discovery in a case in which it was a party. The motion for production of documents under Rule 34 of the Federal Rules of Civil Procedure was served on the United States and, thus, the question of privilege was squarely raised. See *Reynolds* v. *United States,* 192 F. 2d 987, 992–993 (C. A. 3). This Court ruled that the documents in question were privileged. Since the scope of the Government's privilege is not properly in question here, the *Reynolds* case is inapposite.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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